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JAN 11 2001

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Public Record

BY HAND DELIVERY

Honorable Vernon L. Williams  
Surface Transportation Board  
Case Control Unit  
Attn: STB Ex Parte No. 582 (Sub-No. 1)  
1925 K Street, N.W.  
Washington, D.C. 20423-0001



Re: Ex Parte No. 582 (Sub-No. 1),  
Major Rail Consolidation Procedures

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are the original and 25 copies of the Joint Rebuttal Comments of Subscribing Coal Shippers. Also enclosed is a 3.5-inch diskette containing the text of the Joint Rebuttal Comments in WordPerfect format.

Please acknowledge receipt of the enclosed by stamping and returning to our messenger the enclosed duplicate of this letter.

Sincerely,

A handwritten signature in cursive script, appearing to read "John H. LeSeur".

John H. LeSeur  
An Attorney for Subscribing  
Coal Shippers

JHL:cef  
Enclosures

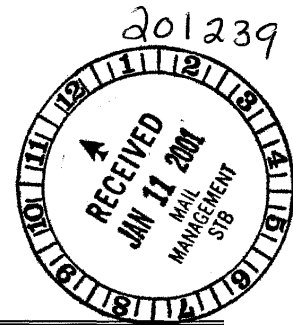
cc: Parties of Record

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BEFORE THE  
SURFACE TRANSPORTATION BOARD



MAJOR RAIL CONSOLIDATION  
PROCEDURES

Ex Parte No. 582 (Sub-No. 1)

**JOINT REBUTTAL COMMENTS OF SUBSCRIBING COAL SHIPPERS:**

WESTERN COAL TRAFFIC LEAGUE,  
AMERICAN PUBLIC POWER ASSOCIATION,  
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,  
ALLIANT ENERGY CORPORATION,  
CITY OF GRAND ISLAND, NEBRASKA,  
CITY UTILITIES OF SPRINGFIELD, MISSOURI,  
LAFAYETTE UTILITIES SYSTEM,  
PLATTE RIVER POWER AUTHORITY,  
SALT RIVER PROJECT AGRICULTURAL  
IMPROVEMENT AND POWER DISTRICT,  
TEXAS MUNICIPAL POWER AGENCY and  
XCEL ENERGY INC.

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Dated: January 11, 2001

Counsel for Subscribing  
Coal Shippers

MAJOR RAIL CONSOLIDATION ) Ex Parte No. 582 (Sub-No. 1)  
PROCEDURES )

WESTERN COAL TRAFFIC LEAGUE,  
AMERICAN PUBLIC POWER ASSOCIATION,  
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,  
ALLIANT ENERGY CORPORATION,  
CITY OF GRAND ISLAND, NEBRASKA,  
CITY UTILITIES OF SPRINGFIELD, MISSOURI,  
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PLATTE RIVER POWER AUTHORITY,  
SALT RIVER PROJECT AGRICULTURAL  
IMPROVEMENT AND POWER DISTRICT,  
TEXAS MUNICIPAL POWER AGENCY and  
XCEL ENERGY INC.

When this proceeding was initiated the Board promised to make "fundamental changes" in its Merger Rules. These "fundamental changes" are necessary, the Board concluded, to address the fact that past mergers had cost shippers hundreds of millions of dollars in service failure damages and the next round of mergers, if approved, would result in a national rail duopoly.

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the STB appears to be backtracking to the "no fundamental change" position advocated by the large railroads. Coal Shippers urge the STB to reconsider the regulatory approach set forth in the NPR and modify the NPR by making "fundamental changes" in its merger rules in the detailed manner requested by Coal Shippers.

I.

**PROCEEDING REVIEW**

These Rebuttal Comments are the fifth set of written comments filed by Coal Shippers in this proceeding. At the outset of this proceeding, the STB promised to make "fundamental changes" in its rail merger rules. The NPR fails to make such changes. Coal Shippers respectfully request that the Board reconsider its NPR in light of the events that led it to institute this proceeding. A brief review of these events is in order.

This proceeding was triggered by the proposal by BNSF and CN to merge. In response, the STB held an extensive set of public hearings and, based upon those hearings, concluded that a crisis existed in the rail industry. As described in the Board's decision, served on March 17, 2000 in Ex Parte No. 582 ("Moratorium Decision"), the crisis had two component parts.

First, the Board concluded that the last several mega-mergers in the rail industry had not gone as planned. Instead of producing benefits to shippers, as the merging carriers had promised, the mergers had in fact created massive post-merger service crises -- crises the Board correctly concluded had irreparably injured the shipping public and had cost shippers hundreds of millions of dollars in service failure damages. (Moratorium Decision at 4-5).

Second, the Board concluded that the numerous mega-mergers had resulted in an extremely concentrated rail transportation market -- a market that was so concentrated that the next round of rail mergers would produce a national rail duopoly. Such a result, the Board acknowledged, raised very serious competitive concerns, since the nation's rail network which is infused with the public interest would be in the hands of only two mega-corporations. (Moratorium Decision at 5-10).

Based upon these findings, the Board took the unprecedented action of imposing a fifteen month moratorium on new rail mergers. This moratorium, according to the Board, was necessary to allow the Board time to rewrite its existing rules governing rail mergers. (Moratorium Decision at 6-10). Two weeks after the Board issued its Moratorium Decision, the Board served the ANPR in these proceedings on March 31, 2000.

In the ANPR, the Board asked for public comments on how its merger rules should be changed to protect shippers from merger-caused service failures and how its merger rules should be changed to promote competition. On competition issues, the Board asked for specific comments on proposals such as "requiring merger applicants to provide switching, at an agreed-upon fee, to all exclusively served shippers located within or adjacent to terminal areas," "requiring merger applicants to offer, upon request, contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment," and requiring merger applicants to "eliminat[e] ... paper and steel barriers" imposed on their shortline connections. (ANPR at 7-8).

The Board also asked for public comments on the need for "additional safeguards" to protect shippers and others from the "significant harm to their businesses" caused by post-merger service failures. One such safeguard upon which public comment was sought was "the right to compensation for service failures." (ANPR at 6, 8).

Following the issuance of the ANPR the Board received two rounds of comments: opening comments on May 16, 2000 and reply comments on June 5, 2000. Coal Shippers presented responsive opening and reply comments. In their Opening Comments, Coal Shippers presented the STB with specific proposed rules that would require merging carriers to compensate rail

shippers for post-merger service failures. A copy of that proposal is appended to these Rebuttal Comments as Attachment 1. Coal Shippers also responded to the Board's request to provide proposed competition-enhancing conditions by presenting specific proposed conditions addressing access, bottleneck and paper barrier concerns. These proposed conditions are appended as Attachments 2, 3 and 4. Finally, Coal Shippers presented a fifth proposed condition addressing pass-through of purchase premium and service disruption costs. A copy of this proposed condition is appended as Attachment 5. Coal Shippers provided a detailed explanation of these proposed conditions, and the need for them, in their Opening and Reply Comments on the ANPR.

The proposals put forward by Coal Shippers were generally supported (in whole or in part) by virtually all participants in this proceeding (including other shippers, governmental agencies, and shortline railroads), other than the nation's large railroads. These large railroads generally asked the STB to maintain the current regulatory status quo. As summarized by the railroad industry's chief spokesgroup, "[t]he Board should ... guard against efforts to use this proceeding as a forum for promoting changes in regulatory philosophy." (AAR ANPR Comments at 8).

As the ANPR process unfolded, the Board was called upon to defend its Moratorium Decision in judicial review proceedings

conducted before the United States Court of Appeals for the D.C. Circuit. In those proceedings, the STB emphasized to the reviewing Court that its moratorium was proper because Congress had "delegated to the Board exclusive and broad authority to determine whether rail mergers are in the public interest"<sup>1</sup> and that exercise of this "broad authority" in the form of a merger moratorium was necessary because "fundamental changes" were needed in the Board's current merger rules governing rail service and competition matters.

On service issues, the Board emphasized to the Court that past mergers had "cost shippers nationwide hundreds of millions of dollars....:"

In the past five years, the railroad industry in the United States underwent several mergers involving the nation's largest railroads, with the result that now only four large railroads remain -- two in the West and two in the East. Unfortunately, with those mergers came severe service disruptions that have cost shippers nationwide hundreds of millions of dollars in lost freight or delayed shipments, and, again unfortunately, many of those problems persist even to this day.

\* \* \*

The well-publicized service crisis that developed shortly after approval of the UP/SP merger cost American business (including both railroads and their customers) hundreds of

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<sup>1</sup> Brief of Respondent Surface Transportation Board, No. 00-1115, et al., Western Coal Traffic League v. STB (D.C. Cir., filed May 19, 2000), at 17, ("STB Moratorium Brief").

millions of dollars and crippled railroad activities throughout the United States for nearly a year. The subsequent service problems following the Conrail division "threatened to bring parts of rail service in the East to a standstill" and "cost corporate shippers millions [of dollars] in delays." The problems with the BN/SF merger, while less publicized, were also substantial, even though, as pointed out by several shippers and shipper groups, . . . that merger was considered to be largely an "end to end" combination that presumably would not create such difficulties. And even the CN/IC merger, which is not yet fully implemented, and as to which the jury is thus still out . . . , has not left all shippers satisfied.

STB Moratorium Brief at 3, 10-11 (footnotes omitted).

On competition issues, the Board emphasized to the reviewing court its concerns that the rail industry was extremely concentrated; that the next round of rail mergers would create a rail duopoly; and that these results "'compel this Board and all other interested parties to rethink the criteria by which rail consolidations are judged'." (STB Moratorium Brief at 4-5, quoting DOT Secretary Slater).

On July 14, 2000 the D.C. Circuit affirmed the STB's Moratorium Decision based upon the STB's representations that "fundamental changes" were needed in the Board's merger rules governing service and competition issues before the STB could review any new merger proposals.<sup>2</sup> Shortly after the D.C. Circuit

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<sup>2</sup> Western Coal Traffic League v. STB, No. 00-1115 (D.C. Cir., July 14, 2000).

issued its decision affirming the moratorium, the BNSF and CN abandoned their proposed merger.

On October 3, 2000, the STB served its NPR. The NPR is a vastly different document than either the Moratorium Decision or the ANPR. Gone are the references to rail "duopoly" concerns, service crises and the need for "fundamental changes" -- i.e. the factual predicates that gave rise to this proceeding and the predicate the agency relied upon in defending its Moratorium Decision in the D.C. Circuit. Instead, the STB reverses course by stating in the NPR that "a fundamental shift in policy is better left to Congress." NPR at 17 (footnote omitted).

Also gone is any responsive follow-through to the Board's ANPR request for proposed service failure compensation conditions and proposed competition-enhancing conditions. Instead, the NPR offers up a "service assurance plan" that contains no service failure compensation component (NPR at 19) and offers up a proposal that merger applicants prepare "a plan for enhancing competition" as part of their merger application. (NPR at 13).

Coal Shippers urge the Board in crafting final rules in this proceeding to be guided by the regulatory principle of "fundamental change" that resulted in the Moratorium Decision and the ANPR, not the different and watered-down set of principles that the Board appears to have adopted in the NPR.

## II

### REBUTTAL ON SERVICE ISSUES

The NPR proposes a "service assurance plan." Coal Shippers emphasized in their NPR Reply Comments that the only way shippers can be "assured" that mergers will not cause post-merger service harms to them is through the Board's adoption of an express condition requiring merging carriers to compensate shippers for merger-related service failures. Coal Shippers' position is shared by virtually all parties to this proceeding, other than the large railroads.

UP claims that it "is the only party to offer a concrete proposal for service remedies." (UP NPR Reply Comments at 11). UP is wrong. Coal Shippers put forward a "concrete proposal" in their initial comments on the ANPR (a copy of which is reproduced in Attachment 1 hereto). Nor is UP's proposal viable. As Coal Shippers have previously demonstrated, UP's proposal is riddled with complications that make it unworkable and liability exceptions that make it non-remedial. (See Coal Shippers ANR Reply Comments at 15-16).

CSX opposes service compensation conditions using the odd argument that the STB "should not permit itself to be turned into a claims tribunal." (CSX NPR Reply Comments at 40). Perhaps CSX has forgotten the principal reason why the STB

exists: to hear and adjudicate shipper claims. Certainly an agency with the broad authority to approve rail mergers has the statutory authority to remedy harms caused to rail shippers by the exercise of that authority.

AAR (and several individual railroads) argue that shippers have remedies for service failures that "are already available" such as "[c]ivil court remedies." (AAR NPR Reply Comments at 14). Judicial relief may be available to some shippers, in some cases, but experience teaches that railroads will fight major claims, leading to expensive and drawn out court proceedings.<sup>3</sup> In fact, all parties (other than the large railroads) maintain that existing compensation remedies are not sufficient.<sup>4</sup> For this reason, the shipping community has requested the STB to devise a simple and expeditious claims process. Coal Shippers submit that its service compensation proposal, set forth in Attachment 1 hereto, provides the requested simple, expeditious and fair process.

Finally, BNSF argues that railroads "will not be able to attract capital" if they are required to pay shippers the actual damages shippers incur for service-related failures. (BNSF NPR Reply Comments at 33). If BNSF, or any other railroad,

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<sup>3</sup> See, e.g., Entergy Services, Inc. v. Union Pacific R.R., 35 F. Supp.2d 746 (D. Neb. 1999) and 99 F. Supp.2d 1080 (D. Neb. 2000).

<sup>4</sup> See Coal Shippers NPR Reply Comments at 8.

thinks that a merger will produce post-merger service failure claims in a dollar amount that is so high it will preclude the merged carrier from "obtaining capital" the merger should not be pursued in the first instance.

### III

#### REBUTTAL ON COMPETITION ISSUES

The STB has proposed that a merger will be approved only if the merger "enhance[s] competition." NPR at 12. The Board, however, adopted no specific "competition enhancing" conditions. Instead, the Board directs the merger applicants, in the first instance, to propose competition-enhancing measures in its merger application. NPR at 13.

Virtually all parties to this proceeding have no idea what the Board envisions by "competition enhancing" measures. For this reason, Coal Shippers, joined by all parties, other than the large railroads, have asked the STB to provide more guidance. Most shippers, and governmental agencies, request the STB to follow-up on its "competition enhancing" standard by promulgating specific competition-enhancing conditions of the type proposed by Coal Shippers. These conditions would require merging carriers to provide access, bottleneck, paper barrier and other forms of competitive relief.

The large railroads, on the other hand, fear the STB may interpret the "competitive enhancing" standard in a merger case as requiring the merging carriers to provide the types of competitive relief sought by Coal Shippers and others. They ask the STB to eliminate the "competition enhancing" standard altogether and, instead, to make no changes in the way the Board's current merger rules address competition issues.

In their defense of the status quo, the large railroads uniformly attack all competition-enhancing conditions proposed by shippers, shortline railroads and governmental agencies like DOT and USDA. The large railroads do not argue that these proposed conditions would not enhance competition -- their intended effect -- but instead resort to name-calling, branding the proposals "re-regulation,"<sup>5</sup> "heavy-handed regulation,"<sup>6</sup> "manufactured competition,"<sup>7</sup> "forced-access,"<sup>8</sup> industry "restructuring"<sup>9</sup> etc. The large railroads also generally cast aspersions on shippers for even raising these issues, evidently forgetting that these were exactly the types of proposals that formed the basis for the ANPR.

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<sup>5</sup> NS NPR Reply Comments at 20.

<sup>6</sup> BNSF NPR Reply Comments at 17.

<sup>7</sup> CSX NPR Reply Comments at 24.

<sup>8</sup> NS NPR Reply Comments at 6.

<sup>9</sup> AAR NPR Reply Comments at 1.

The arrogant attitude of the large railroads toward the shipper, shortline and government agency sponsored competitive conditions is best encapsulated by the AAR, which claims that it is "hard to believe" that shippers expect the Board to take these proposals "seriously." (AAR NPR Reply at 6). Coal Shippers submit that if anyone's position is "hard to believe," and one that should not be taken "seriously," it is the "no change" position on competition issues forwarded by the large railroads.<sup>10</sup> As discussed in Part I, above, this proceeding was initiated because of the STB's fears that the next round of major rail mergers would result in a national rail duopoly. This unheard-of concentration of economic power in the hands of two mega-carriers is truly frightening and, if allowed to occur, must include major competition-enhancing conditions.

Coal Shippers previously pointed out that other government regulators have routinely conditioned mega-mergers with access conditions, citing the access conditions which the Department of Justice imposed on the proposed AOL/Time Warner

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<sup>10</sup> Commentor American Antitrust Institute ("AAI") likewise criticizes the NPR in large part because the proposal continues to "rel[y] on the merging parties to offer information and remedies that are against their own interest." See November 17, 2000 letter from Professors John E. Kwoka, Jr. and Lawrence J. White (on behalf of the AAI) to Chairman Morgan. In this respect, says AAI, the "procedures are fundamentally flawed and will not result in the protection of consumers and competition in the railroad sector." Subscribing Coal Shippers concur in this criticism.

Department of Justice imposed on the proposed AOL/Time Warner merger as the most recent example.<sup>11</sup> The same is true for mergers involving electric utilities, and other similarly situated industries.<sup>12</sup>

Coal Shippers urge the STB to reject the large railroads' request to eliminate the NPR competition enhancement requirement and to reconsider its proposal by adopting the specific competition-enhancing conditions proposed by Coal Shippers.

#### **CONCLUSION**

Coal Shippers respectfully request the Board to adopt final merger rules consistent with its comments in this proceeding.

Respectfully submitted,

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Dated: January 11, 2001

Counsel for Subscribing  
Coal Shippers

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<sup>11</sup> Coal Shippers NPR Reply Comments at 7.

<sup>12</sup> See, e.g., EEI NPR Reply Comments at 12; PPL NPR Reply Comments at 6-8; ACC Reply Comments at 5-6.

Attachment 1

Service Condition

Coal Shippers request the Board to amend its merger rules by adopting the following service condition rule:

The Board will impose as a condition on any major rail consolidation transaction a requirement that the consolidated carrier(s) make any shipper financially whole for any injuries the shipper incurs as a result of post-consolidation service problems. The shipper may submit a claim to a carrier for compensation under this regulation at any time following the Board's approval of the consolidation. The consolidated carrier shall pay the claim within fourteen (14) days of its receipt of the shipper's claim; provided, however, if the carrier disputes the claim, it shall so notify the claimant in writing and explain therein, with specificity, the basis for its dispute, within fourteen (14) days of its receipt of the shipper's claim. If the consolidated carrier so disputes a shipper's claim, the shipper may institute a proceeding at the Board to obtain payment. The Board shall complete any proceeding under this rule within one hundred eighty (180) days after the filing of the request for relief. A consolidated carrier may not raise as a defense that its liability to any shipper is limited by the terms of any contract or other arrangement with the shipper. This section shall apply to all major consolidation transactions approved on or after January 1, 1996.

Access Relief

Coal Shippers request the Board to amend its merger rules by adopting the following access relief rule:

The Board shall impose as a condition on any major rail consolidation transaction the following access relief:

(a) Following the Board's approval of a major rail consolidation transaction, any person, including an affected shipper, may request the consolidated carrier(s) to allow a second carrier to use its or their facilities to provide competitive rail service. The carrier shall have ninety (90) days to respond to the request. If the carrier denies the request, the person may seek relief from the Board as provided in subsection (b) below.

(b) Upon request of any person, including an affected shipper, and subject to the requirements of subsection (a), the Board shall require railroad facilities owned by the involved rail carrier to be used by another rail carrier if the Board finds that use will not substantially impair the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business. The Board shall establish compensation for the use of the facilities on a usage basis based upon a sharing of the total costs incurred. Total costs shall include roadway maintenance expenses, dispatching expenses, and return on and of net book investment on road property. The rail carriers are responsible for establishing the conditions for use of the facilities, except compensation. However, if the rail carriers cannot agree, the Board shall establish conditions for use of the facilities. The compensation shall be adequately secured before a rail carrier may begin to use the facilities of another rail

carrier under this section.

(c) A rail carrier whose railroad facilities are required to be used by another rail carrier under this section is entitled to recover damages from the other rail carrier for injuries sustained as the result of compliance with the requirement or for compensation for the use, or both as appropriate, in a civil action, if it is not satisfied with the conditions for use of the facilities or if the amount of the compensation is not paid promptly.

(d) The Board shall complete any proceeding under subsection (b) within 180 days after the filing of the request for relief.

Attachment 3

Bottleneck Relief

Coal Shippers request the Board to amend its merger rules by adopting the following bottleneck relief rule:

The Board shall impose as a condition on any major rail consolidation transaction the following bottleneck rate relief:

(a) Following the Board's approval of a major rail consolidation transaction, upon the request of a shipper, the consolidated rail carrier(s) shall establish a rate for transportation and provide service requested by the shipper between any two points on the system of that carrier where traffic originates, terminates, or may reasonably be interchanged. A carrier shall establish a rate and provide service upon such request without regard to: (i) whether the rate established is for only part of a movement between an origin and a destination; (ii) whether the shipper has made arrangements for transportation for any other part of that movement; or (iii) whether the shipper currently has a contract with any rail carrier for part or all of its transportation needs over the route of movement; provided, however, that if such a contract exists, the rate established by the carrier shall not apply to transportation covered by the contract.

(b) A shipper may challenge the reasonableness of any rate established by a consolidated rail carrier in accordance with subsection (a). The Board shall determine the reasonableness of the rate so challenged without regard to: (i) whether the rate established is for only part of a movement between an origin and a destination; (ii) whether the shipper has made arrangements for transportation for any other part of that movement; or (iii) whether the shipper currently has a contract with a rail carrier

for any part of the rail traffic at issue,  
provided that the rate prescribed by the  
Board shall not apply to transportation  
covered by such a contract.

Paper Barrier Relief

Coal Shippers request the Board to amend its merger rules by adopting the following paper barrier relief rule:

The Board shall impose as a condition on any major rail consolidation transaction the following paper barrier relief:

(a) "Paper barriers," as used in this section, refer to the terms in agreements between (i) Class I railroads and (ii) Class II or Class III railroads ("shortlines") or non-carriers which impair or penalize the shortline's freedom to interchange traffic with carriers with which the shortline can physically connect.

(b) Following the Board's approval of a major rail consolidation transaction, any person (including an affected shipper) may request the consolidated carrier to remove one or more paper barriers. The carrier shall respond within thirty (30) days after receipt of the request. If the carrier does not grant the request, a person may institute proceedings at the Board.

(c) Upon receipt of a request, and subject to the provisions of subsection (b), the Board shall direct the consolidated carrier to remove a paper barrier unless the carrier can demonstrate that retention of the paper barrier is in the public interest. In making a public interest finding, the Board will be guided by the principles set forth in subsection (d).

(d) Paper barriers to interchange are inherently anti-competitive, and are unreasonable unless they are necessary to the achievement of a public benefit that outweighs the harm they cause to competition, and then only if they are no broader or more restrictive than necessary to achieve that

benefit. There is a rebuttable presumption that a paper barrier is unreasonable insofar as it (i) lasts longer than five (5) years from the date of the agreement containing the paper barrier, or (ii) includes any financial penalty on a shortline that is triggered by the interchange of traffic with another carrier, or (iii) includes credits for traffic interchanged with a carrier against a rental or sale price that reflects a return of more than the railroad industry's cost of capital on the fair market value of the properties sold or leased. For purposes of this section, "fair market value" shall be computed without considering the revenues earned by the carrier for handling traffic originating or terminating on those properties over other parts of its system.

Attachment 5

Regulatory Cost Condition

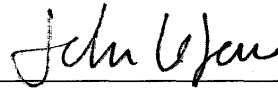
Coal Shippers request the Board to amend its merger rules by adopting the following Regulatory Cost Condition rule:

The Board shall impose as a condition on any major rail consolidation transaction the following regulatory cost relief:

(a) In any proceeding at the Board involving development or use of a consolidated carrier's costs for providing rail transportation service, costs associated with rail service problems, or purchase premiums paid for a carrier's assets, shall be excluded from the carrier's cost of service under the Board's General Purpose Costing Systems. "Purchase premium," as used in this paragraph, refers to the difference between the net book value and the purchase price of the involved rail properties. This section shall apply to all major consolidation transactions approved on or after January 1, 1996.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of January, 2001, I have served a copy of the foregoing Joint Rebuttal Comments of Subscribing Coal Shippers on all persons designated as a Party of Record in this proceeding by postage pre-paid, first-class United States mail.

A handwritten signature in cursive script, reading "John LeSeur", positioned above a horizontal line.

John H. LeSeur  
An Attorney for Subscribing  
Coal Shippers